ING HONG AUTO SPARES SDN. BHD.

v.

THE HONGKONG & SHANGHAI BANKING CORP. & ANOR. & ANOTHER CASE

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL APPEAL NO. 30 OF 1983]
28 JANUARY 1983

CIVIL PROCEDURE: *Land sold by Court in execution proceedings - Charge not disclosed in conditions of sale - Conditions of sale varied after auction - Whether chargor had priority over other judgment creditors - Rateable distribution amongst judgment creditors - Purchaser had indefeasible title.*

This was an appeal against the Magistrate's decision disallowing an application by the appellant under O. 24 r. 28, Subordinate Court Rules 1980 to set aside an earlier order made by another Magistrate varying the conditions of an auction sale of piece of land after the sale and confirming the sale without notice to the judgment creditors who had an interest in the proceeds of the sale. The said land was purchased by the second respondent at an auction arising out of execution proceedings. After the sale, the respondents made an application *ex parte* whereby the conditions of sale were varied whereby the second respondent was ordered to pay the proceeds of sale direct to the first respondent who had a charge in respect of the said land. The said charge had not been disclosed in the conditions of sale. At the time the application was made, the appellant and other judgment creditors had applied to the Court for rateable distributions under O. 30A r. 1.

Held:

[1] The sale to the second respondent has been registered under the National Land Code and the purchaser had an indefeasible title. There was no evidence to show that the title was defeasible.

[2] The balance of the purchase price should be paid into Court to be distributed rateably amongst the creditors. From the true construction of the charge the first respondent had priority in the distribution of the sum.

[Appeal allowed. First respondent to pay costs here and below.]

Legislation referred to:
National Land code 1965, ss. 246, 340
Subordinate Court Rules 1980, O. 24 r. 28, O. 30 rr. 4, 14(2), (4), O. 30 r. 4(4), O. 30A

For the appellant - C.R. Lim; M/s. Lim and Teng
For the respondents - K. S. Gan; M/s. Gan & Lim

JUDGMENT

LC Vohrah J:

This is an appeal against the decision of a learned Magistrate disallowing an application made by the appellant under O. 24 r. 28 of the Subordinate Court Rules 1980 to set aside an order made earlier by another Magistrate varying the conditions of an auction sale of a piece of land after the sale, and confirming the sale without notice to the judgment creditors who had an interest in the proceeds of the sale.

The facts in so far as they are relevant to this appeal are as follows. On 27 April 1982 the appellant obtained judgment in default of appearance against one Lim Gek Kew trading as Heap Hin Trading Machinery company for RM42,292.48. Previously Hock Hua Bank Berhad ("HHBB") had on 22 December 1981 also obtained default judgment against Lim Gek Kew in pursuance of which it initiated execution proceedings and as a consequence land held under HS (D) 14624 for PTD 11604 in the Mukim of Plentong, Johor, belonging to Lim Gek Kew ("the said property") was on 2 September 1982 ordered by the Magistrates' Court to be sold by public auction on 11 October 1982. However, on 9 October 1982 the first respondent as chargee of the said property under the charge Presentation No. 17685 Vol. No. 755 Folio No. 23 dated 16 September 1980 ("the Plentong charge") filed an objection and bailiff took out an interpleader summons which was heard by a Magistrate ("the first Magistrate") who on 21 October 1982 made a specific finding that the said property was not the property of the first respondent and accordingly order that the auction sale take place on 28 October 1982 and that the proceeds of the sale be deposited in Court. The parties to this interpleader summons were HHBB as execution creditor, and the first respondent as claimant. There was no appeal against this decision of the first Magistrate and no application was made for stay of the auction sale. In the result the said property was sold to one Ng Hoon Ting for RM99,500 who paid the stipulated 25% deposit amounting to RM25,000 into Court. On 20 November 1982 about a week before the expiry of the 30-day period for payment of the balance of the purchase price in the sum of RM74,500, the first respondent and Ng Hoon Ting jointly made an application *ex parte* praying for six orders namely,

(1) That the auction sale held on 28 October 1982 of the property comprised in HS (D) No. 14624 Lot No. 11606 in the Mukim of Plentong together with the building erected thereon and known as No. 26, Jalan Puteh Empat, Taman Pelangi, Johore Bahru, Johore is subject to the Charge *vide* Presentation No. 17685 Vol. No. 755 Folio No.23 dated 16 September 1980 secured by the claimants abovenamed and encumbered by the defendant abovenamed in the total sum of RM116,860.45 as on 22 September 1982;

(2) That the proceeds from the auction sale of the property to the Purchaser abovenamed in the sum of RM99,500 be applied firstly towards the satisfaction of all costs, expenses and fees of and incidental to the sale and secondly towards the satisfaction of the amount of the principal and interest due to the claimants abovenamed under the Charge;

(3) That out of the sum of RM25,000 paid into Court by the Purchaser abovenamed as deposit towards the proceeds of the sale ... the costs,expenses and fees of and incidental to the sale be deducted therefrom and the balance thereof ... be paid over to the claimants towards redemption of the amount due to the said claimants;

(4) That the Purchaser herein be at liberty to pay the said balance sum of RM74,500 out of the purchase price of RM99,500 direct to the claimants abovenamed towards redemption of the said property;

(5) That the sale of property to the Purchaser abovenamed be hereby confirmed; and

(6) Liberty to apply.

This application was heard by the President of the Sessions Court sitting as a Magistrate ("the second Magistrate") who, on the following day, granted orders in terms of all the prayers. The effect of the orders in terms of prayers (1), (4) and (5) was to vary the

Special Conditions of Sale by (i) adding an additional condition in stipulating that the auction sale was specifically subject to the Plentong charge secured by the first respondent and encumbered by Lik Gek Kew for the sum of RM116,860.45 as at 22 September 1982, (ii) authorising payment of the balance of the purchase price due from Ng Hoon Ting **direct** to the first respondent instead of into Court, and (iii) confirming the sale of the said property to Ng Hoon Ting **before** the full purchase price had in fact been paid. The particulars and conditions of the auction sale had earlier been settled in accordance with the provisions of O. 30 r. 14(2)except that the particulars of the Plentong charge had not been disclosed as required by that sub-rule which reads:

> (2) The bailiff shall prepare particulars and conditions of sale which shall contain particulars of any incumbrances on the property to be sold, and shall submit the same to Court for approval and for its direction as to the manner of advertising the sale, and shall comply with such directions. Notice of the appointment to obtain approval shall be served on the execution creditor and the judgment debtor.

The said sum of RM116,860.45 was claimed by the first respondent in respect of monies allegedly due or owing to it by Heap Hin Trading Machinery company (solely owned by Lim Gek Kew) under two charges created in favour of the first respondent, a charge executed on 29 July 1978 secured by a piece of land belonging to one Lim Thiam Chwee known as HS (D) 8125 for Lot PTD 8047 in the Mukim of Senai-Kulai up to an aggregate sum of RM73,000 plus interest ("the Senai-Kulai charge") on an overdraft facility and the Plentong charge that was executed on 16 September 1980 secured by the said property up to an aggregate sum of RM33,000 plus interest for a fixed loan. At the time when the joint *ex parte* application was made by the first respondent and Ng Hoon Ting not only the appellant but other judgment creditors had applied to the Court for satisfaction of their judgments so that clearly the proceeds of the auction sale ordered by the Court as a result of HHBB's execution proceedings were to be subjected to rateable distribution under O. 30A r. 1 the relevant provisions of which read:

> 1.(1) Where assets realised by sale or otherwise in execution of an order or judgment and more persons than one have, prior to the realisation, attached the property from which those assets have been realised in execution of orders or judgments for the payment of money against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of the realisation, shall be distributed rateably among all such persons:
>
> Provided as follows:
>
> (a) Where any property is sold subject to a charge, the chargee or incumbrancer shall not as such be entitled to share in any surplus arising from the sale;
>
> (b) Where any property liable to be sold in execution of an order or judgment is subject to a charge, the Court may, with the consent of the chargee or incumbrancer, order that the property be sold free from the charge, giving to the chargee or incumbrancer the same right against the proceeds of sale as he had against the property sold;
>
> (c) where any immovable property is sold in execution of an order or judgment ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied - first, in defraying the expenses of the sale;
>
> secondly, in discharging the interest and principal money due on the incumbrance;

thirdly, in discharging the interest and principal money due on subsequent incumbrances (if any);

fourthly, rateably among the holders of orders of judgments for the payment of money against the judgment debtor who have, prior to the sale of the said property, applied to the Court which passed the order or judgment ordering the sale for execution of those order or judgments and have not obtained satisfaction thereof; and

(d) where the property from which the assets have been realised has prior to the realisation been attached by the High Court and also by one or more of the Subordinate Courts, no holder of a decree passed by a Subordinate Court shall be entitled to share in the distribution of the assets unless he shall prior to the realisation have given notice in writing to the Registrar of the attachment at his instance of the property by the Subordinate Court.

On 11 December 1982 HHBB and the appellant by separate applications applied to set aside all the orders that had been granted *ex parte.* HHBB's application came up before the second Magistrate who, after hearing evidence given by the Registrar of Titles, Johore Bahru, and by the manager of the first respondent dismissed the application on 28 April 1983. There was no appeal by HHBB against this order of dismissal. The appellant's application (in the form of an amended application necessitated by the addition of the applicant's name which had been omitted in the original application) was set down for hearing before yet another Magistrate ('the third Magistrate") who, some months afterwards on 15 October 1983, heard the application and dismissed it with costs on 19 October 1983. The reason given by the third Magistrate (as discerned from her grounds of decision) for refusing to set aside the orders that had been granted by the second Magistrate was that the failure to disclose the particulars of the Plentong charge in favour of the first respondent in the Special Conditions of Sale as required by O. 30 r. (14)(2) necessitated varying the conditions of sale so that the *ex parte* application "to perfect the auction sale was properly made" and that was why she was not going "to disturb" the orders that had been granted on 21 November 1982.

Mr. C.R. Lim, Counsel for the appellant, contends that the third Magistrate erred in law and on the facts when she decided not to set aside the orders on the *ex parte* application and he founded his arguments, as I see it, substantially on two grounds:

1. That under O. 30 r. 4(4) the application should not have been made and heard *ex parte* as neither the judgment debtor nor the other parties interested in the proceedings had been served and that in any event no application could be made for confirmation of the sale until the full purchase price had been paid; and

2. That having regard to the fact that the said property which was sold was secured by the Plentong charge only for a fixed loan of RM33,000 the respondent was entitled to realise the sum of RM24,846.44 then due under the Plentong charge and not the combined amounts due under the Plentong charge and the Senai-Kulai charge.

I shall now proceed to deal with the first ground put forward by Mr. Lim. Order 30 r. 14(4) reads:

(4) At any time after payment of the purchase price, the execution creditor, judgment debtor or purchaser may apply to the Court for confirmation of the sale and the bailiff shall be served with the application. Where the application is made by the execution creditor

or by the purchaser, the judgment debtor shall be served with the application. The Court may confirm the sale, or may on grounds of any fraud or material irregularity set the sale aside, and may in such event order a re-sale:

Provided that before setting aside any sale, the Court shall cause the purchaser if not already a party, to be served.

Thus it is clear that it would have been open to the purchaser Ng Hoon Ting to make an application for confirmation of the sale of the said property to him but it is also clear that the application for confirmation could only have been made after he had paid the full purchase price and the application had been served on Lim Gek Kew as judgment debtor. However neither of these conditions was fulfilled. Further, I observe that the application that has been impeached was not merely an application for confirmation of the sale but a multiple application which included one prayer for the variation of the method of payment of the balance of the purchase price which had been prescribed in the conditions of sale and another for the inclusion of an additional condition that the sale was subject to the Plentong charge for a sum far in excess of the amount owing under the loan specifically secured by that charge. In view of the order of the first Magistrate and condition 8 of the Special Conditions of Sale prescribing that the proceeds of the auction sale be deposited in Court, this application was in effect an attempt to specifically protect the interest of the first respondent without the other parties, who were on record as being interested in the proceeds of the sale, being afforded the opportunity of having their say contrary to the rules of natural justice. It certainly was not an application to vary the conditions of sale for a mere omission as described by the third Magistrate. In my view, the application *ex facie* should not have been heard *ex parte* and I therefore find that the second Magistrate erred in so hearing it and in granting the orders that he did. However the sale to the purchaser Ng Hoon Ting has been perfected by registration and as no circumstances have arisen or have been urged which fall within the ambit of s. 340 of the National Land Code to suggest that his title to the said property is defeasible, the prayer in this appeal that the auction sale be set aside and the said property reauctioned must be dismissed.

I come now to the second ground which deals specifically with the alternative prayer in the appeal that the proceeds of the auction sale be distributed in accordance with the relevant provisions of O. 30A. The question to be considered here is whether the Court should step in and modify, and if so, in what manner, the conditions of sale as varied by the second Magistrate providing that the balance of the purchase price be paid direct to the first respondent instead of payment into Court as originally ordered by the first Magistrate and as laid down in condition 8 of the Special Conditions of Sale. It is a well-known principle that the Court will not act in vain. Mr. K.S. Gan, Counsel for the respondents, contends that the first respondent is entitled to the whole of the balance of the purchase price in priority over all other creditors. If this contention is correct, in view of the amount claimed by the first respondent, the judgment creditors will be excluded from rateable distribution as no balance will remain for distribution. It follows that if the first respondent's claim is sustainable, to order at this stage that the balance be paid into Court would amount to embarking on an exercise in futility as the other creditors would suffer no more and no less loss or damage than they would should the *status quo* be allowed to remain. On the other hand, should the first respondent's claim for the full amount not be sustainable, to allow the current order of the second Magistrate

to stand would be to deprive the other creditors of their rights to their equitable share in the rateable distribution of the balance of the purchase price. The crucial question to be determined therefore is whether in law, on a proper interpretation of the transactional relationship between the judgment debtor and the first respondent as shown by the documentation and evidence furnished in this case, the first respondent has clearly established that it is entitled as chargee of the said property to treat the said property as security for the recovery of both the total amount due from the judgment debtor on the fixed loan account and the total amount due on the overdraft account.

The evidence as to the transactions between the first respondent and the judgment debtor is by no means explicit. However what is clear and undisputed is that some time in 1980 the limit of RM73,000 on the overdraft facility extended to the judgment debtor by the first respondent on the operation of his current account had been exceeded and around that time the first respondent extended to the judgment debtor the fixed loan of RM33,000 which was utilised in the reduction of the overdraft. The fixed loan of RM33,000, as has been mentioned, was secured by the Plentong charge over the said property. Mr. Gan's contention is that by the terms of this charge, as contained in the Annexure to the charge instrument, the said property was charged as security not only for the RM33,000 fixed loan and the interest thereon but also for all sums owing to the first respondent by the judgment debtor including the whole amount due then and at any time thereafter by way of the overdraft facility utilised by the judgment debtor via his current account. To determine the correctness or otherwise of this contention the relevant provisions of the Annexure to Plentong charge instrument must be examined. They are contained in Clauses 1, 6 and 7 which read:

> (1) The Chargor(s) will on demand pay to the Bank all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the abovenamed Heap Hin Trading Machinery Co. ... (hereinafter called the "Customer(s)") solely or jointly with any other person firms or companies and whether as principal or surety or which the Customer(s) may be or become liable to the Bank anywhere on banking account or accounts current or otherwise or in any manner whatosever including the balance for time being owing for or in respect of cheques bills notes drafts or other negotiable instruments accepted paid or discounted for an on behalf of the Customer(s) either alone or jointly with another or others or for any other payments loans credits or advances made to or for the use or accommodation or on behalf of the Customer(s) whether alone or jointly with another or others pursuant to or in respect of or under any guarantee or letter of credit given established or opened by the Bank for the Customer(s) or any contracts for the forward delivery of goods bills or specie or in respect of any other banking facilities whatsoever whether or not given upon or under any trust receipts or other security whatsoever or otherwise howsoever up to an aggregate sum of Dollars Thirty-Three Thousand (RM33,000) for principal only together with the interest thereon at the rate of Eleven per centum (11%) per annum with monthly rests (hereinafter referred to as the "Prescribed Rate" which expression shall wherever the context so permits include any and such other rate which the Bank at any time and from time to time may stipulate in the manner hereinafter appearing) commission discount and all other banking charges and costs charges and other expenses which the Bank may charge in respect of any of matters aforesaid or which the Bank may pay or incur in registering this charge or in perfecting the present security or in perfecting the present security or in enforcing or obtaining payment of such moneys or in paying any expenses or outgoings whatsoever in respect of or insuring repairing maintaining managing or realising the Said Land and or any buildings fixtures crops or

plants thereon or in defending prosecuting or otherwise howsoever taking part in or attending at (whether on a watching brief as observer or otherwise howsoever) any action enquiry hearings suit or other proceedings whatsoever affecting the Said Land or any buildings fixtures crops or plants thereon and also all other payments and sums hereinafter mentioned or stipulated and other usual banker's charges.

And if when the said account or accounts current or otherwise shall be closed either by demand as aforesaid or by the death/liquidation of the Chargor(s) (or where the Chargor(s) shall be more than one person by the death of any one of them) a balance shall be owing to the Bank by the Customer(s) the Chargor(s) or the personal representatives/liquidators of the Chargor(s) as the case may be will so long as the same or any part thereof shall remain owing pay to the Bank interest thereon at the Prescribed Rate with monthly rests computed from the time when such balance shall have been ascertained and the Chargor(S) agree(s) that the statement of the Manager Assistant Manager Sub-Manager Accountant or any other Officer of the Bank as to the amount of such balance shall be final and conclusive.

(6) The security created by this charge is expressly intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the Customer(s) whether alone or jointly and severally with and another or others and whether as principal or surety notwithstanding that the Customer(s) may at any time or times cease to be indebted to the Bank for any period or periods and notwithstanding that the account or accounts of the Customer(s) with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of account or accounts or otherwise.

(7) The Bank may at its discretion from time to time at the request of the Chargor(s) advance to the Customer(s) such further sum or sums of money beyond the limit hereinbefore mentioned as the Bank may deem fit and such sum or sums so advanced shall form part of the money hereby secured.

Clause 1 clearly imposes a limit of RM33,000 for principal plus interest at 11% per annum on the amount secured by the charge. The words of Clauses 6 are very wide. I accept that the words "The security ... shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the Customer(s)" are clearly wide enough to include sums then or thereafter owing by virtue of the overdraft facility but, without more, this would include such sums only up to a limit of RM33,000 plus interest. The words of Clause 7 then become crucial to the question under consideration for Clause 1 and 6 must be read in the light of Clause 7 which creates an exception to the limit expressed in Clause 1 to which any moneys falling within the wide terms of Clause 6 are otherwise subject. Clause 7 specifically expresses an intention that the limit set in Clause 1 may be exceeded in certain circumstances namely, the first respondent's advancing at the chargor's (judgment debtor's) request a further sum or sums of money, i.e. Clause 7 qualifies the limit expressed in Clause 1 in certain circumstances. I am of the view that if there was evidence before the Court that **after** the coming into existence of this security, i.e. the Plentong charge, the first respondent in fact advanced additional sums of money to the judgment debtor such sums would have been secured by the charge irrespective of whether they were advanced through the mechanics or further fixed loans or merely by further cheques drawn by the judgment debtor on his overdrawn current account. I am unable to accept, however, that amounts advanced to the judgment debtor in excess of the sum of RM33,000 plus interest **before** the coming into existence of the charge could be squeezed within the ambit of Clause 7 so as to further raise the limit on

the amount secured by the charge. To claim such an interpretation demands stretching the interpretation of this provision beyond the ordinary and natural meaning of the words to imply a retrospective effect not expressed in the words themselves which in the particular circumstances obtaining in this case at the time would have made utter nonsense of the limit expressly set out in Clause 1. Additionally, I am of the view that the word "further" in Clause 7 read together with the expression "The Bank may ... from time to time advance" can only be read as being applicable to a future and not a past advance. The document is clearly that of the first respondent which if it wished by the charge instrument to secure past advances over the limit expressed in Clause 1 could have easily so worded it at the time. They did not do so and cannot now be permitted by reason or hindsight to strain the meaning of the words of the clause so as to include advances already made. Even if there had existed some ambiguity in the construction of the charge the doctrine ***contra proferentem*** must surely apply in this case.

Mr. Gan submitted also that s. 246 of the Code supports his contention that the first respondent could claim recovery of all moneys advanced by way of overdraft facilities. Section 246, as I read it, confers the right to tack for further advances in priority to a subsequent charge in certain circumstances. I am unable to see that this section has any relevance whatever to the question under consideration dealing as it does with priorities between chargees and the making of advances subsequent to the registration of a second charge.

In the event, I find that it is not established that the first respondent is entitled to the whole of the balance of the purchase price. It is however entitled to the sum of RM33,000 plus interest comprised of RM24,846.44 being the agreed sum due under the fixed loan together with a portion of the amount advanced by way of overdraft on the current account pursuant to Clause 1. There is no evidence before the Court of further advances having been made after the date of the Plentong charge. If there were such advances whether by way of further loan or the honouring of cheques drawn on the overdraft current account these have the effect of raising the limit pursuant to Clause 7 and so become secured. However on the evidence available the first respondent has not established the fact of such further advances and it is not possible for the Court to presume their existence so as to confer a right upon the first respondent to further proceeds of the sale.

Accordingly if the order for the balance of the purchase moneys to be paid direct to the first respondent were allowed to stand, the judgment creditors would suffer severe prejudice. I therefore order that the balance of the purchase price be paid into Court within 30 days to be distributed rateably between the creditors, the first respondent to take priority in the distribution in the sum of RM33,000 plus the amount of any further advances made subsequent to the execution of the Plentong charge whether by way of fixed loan or cheques met on overdraft plus interest at 11% per annum up to the date when the first prohibitory order was made against the said property at the instance of HHBB.

As the appeal is allowed and as the first respondent has, as against the second respondent, been the effective beneficiary of purchase moneys, the first respondent is ordered to pay the costs here and below.

I have one final observation to make. This appeal has demonstrated the desirability of having the same Magistrate deal with any subsequent application relating to the variation of an order he has made particularly when the application relates to the setting aside of that order. This, I think, will to a great extent avoid the situation that gave rise to this appeal.

Also found at [1988] 1 CLJ 807